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No.

IN THE

Supreme Court of the United States

Rachel Kapan,

Petitioner,

v.

Spencer Kagan

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

Rachel Kaplan
Petitioner
35 Willow Avenue
Winthrop, MA 02152
(617) 846-6425

Dated: January 24, 2005

QUESTIONS PRESENTED

1. Whether the trial court properly dismissed a case scheduled for a jury trial because an expert witness retained by the plaintiff failed to appear for a *voir dire* because he was misdirected to the wrong courtroom by the clerk of the court.

2. Whether it was proper to dismiss a jury case for failure of an expert to appear at a *voir dire* when the plaintiff had hired three expert witnesses

3. Whether it is necessary in a jury trial for a plaintiff to have an expert witness

4. Whether the law of Massachusetts requires an expert witness in every legal malpractice case.

5. Whether an expert witness is required in a jury case where the malpractice is clear on the undisputable facts

PARTIES TO THE PROCEEDINGS BELOW

RACHEL KAPLAN, Petitioner

SPENCER KAGAN, Defendant

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rachel Kaplan respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts

OPINIONS BELOW

Supreme Judicial Court of Massachusetts (FAR-14258 6); Court of Appeals (2003-P-0231) and Suffolk Superior Court (94CV03534) reproduced in the Appendix to this Petition for Certiorari

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment 5 and 14. The Fifth Amendment to the U.S. Constitution provides for due process and the Fourteenth Amendment makes the Fifth Amendment applicable to the Commonwealth of Massachusetts

JURISDICTION

This Court has jurisdiction over the judgment of the Supreme Judicial Court of the State of Massachusetts by virtue of Title 28 U.S.C. § 1254

STATEMENT

This case present the fundamental question of law relating to the Seventh Amendment right to a jury trial of whether a litigant can be deprived of the jury right by a last minute maneuver (the day before trial) by scheduling a *voir dire* of the litigant's expert witness and then dismissing the case because the expert was misdirected as to the courtroom where he was to appear, and in any event, the litigant had retained two other expert witnesses

The Plaintiff, Rachel Kaplan ("Kaplan"), now a pro se litigant, originally brought this action against the Defendant, Spencer Kagan ("Kagan"), an attorney at law of Massachusetts for legal malpractice by hiring the Boston law firm, of Meizler and Benowitz, which handled the case for 6 years prior to their withdrawal because they wanted Kaplan to testify falsely in the jury trial that was scheduled to take place. Meizler and Benowitz took the case because Kagan represented Kaplan without authorization in a divorce proceeding in the Probate and Family Court, and breached or failed to exercise the standard of legal care owed to her in handling the matter for which he was not retained.

Kagan represented Kaplan without her knowledge or consent, resulting in a completely fraudulent action by the Probate and Family Court. In addition, although Kagan acted without authorization in the divorce action, he completely and fraudulently neglected an equity action where he entered an appearance on behalf of Kaplan, again without her authorization.

In the present action, Kagan made a motion for summary judgment alleging that Kaplan required, and did not have, an expert witness, despite the fact that Kaplan had engaged three experts and so advised the Court.

After a hearing on the alleged need for an expert witness, and alleged consideration of the material facts relating to the need for an expert witness, the Court granted the motion for summary judgment on June 9, 2000. " Scheduled then was a *voir dire* hearing on the qualifications of Patrick Shanley, Esquire, to act as an expert witness for the plaintiff in this legal malpractice action."

Despite the fact that Kaplan had advised the Court that she had retained three expert witnesses, and that one of the retained experts was scheduled to appear for the *voir dire*, but had been delayed, the Court ruled: "... the defendant's Emergency Motion for Summary Judgment is allowed and the case is dismissed."

On April 11, 2000, the defendant Kagan, just three (3) days before the scheduled empanelment of a jury in this case, served and filed an "Emergency Motion for Summary Judgment" that is in issue. The hearing was scheduled to be heard just one day before the jury was to be empaneled. The basis for the motion was that the plaintiff Kaplan , who was proceeding *pro se*, did not have an expert witness available to testify on her behalf.

The court ruled, that in Kaplan's case, the plaintiff must prove, among other things, (1) that the defendant's representation fell below the standard of legal care – which includes proof of what that standard was; (2) that as a result of the breach or failure, the plaintiff suffered a loss that she would not otherwise have incurred; and (3) that the attorney's breach or failure with regard to the standard of legal care was a cause of the plaintiff's loss.

The Court then stated: "The law in Massachusetts is quite clear that in order to prove each of the foregoing three elements a plaintiff must present evidence from a duly qualified expert witness".

By an order dated April 13, 2000, the Court conditionally allowed the
defendant's motion for summary judgment because the expert witness that plaintiff had retained, Attorney Kevin P. Curry, 50 Congress Street, Boston, wrote to the Court stating that he would not testify, despite the fact that Curry had been retained earlier, paid a fee, and had agreed to testify .

The Court indicated that "it undoubtedly would have been warranted to ... dismiss the plaintiff's case", but she was given essentially another month, until May 11, 2000, to engage an expert and report back to the Court.

At a hearing on May 11, 2000, the plaintiff appeared and filed the resume of Attorney Patrick Shanley, who had been referred to plaintiff by the Lawyer Referral Service of the New Hampshire Bar Association, along with Supplemental Answers by Shanley to Expert interrogatories dated May 9, 2000.

Those answers stated that the plaintiff expected to call Attorney Shanley as her expert witness.

On the request of counsel for the defendant, the Court then scheduled a *voir dire* hearing for June 9, 2000, at 10:00 a.m. Before the hearing, the plaintiff sent the Court a letter from the plaintiff stating that Attorney Shanley could not arrive for the 10:00 o'clock hearing until about 11:00 a.m.

Attorney Shanley arrived at the Court house at 10:45 a.m. He was told that the "motion" was to be heard in court room 4, but when he went there, a trial was in progress. When he returned to the motion desk, he was told that the motion would be heard at 2:00 p.m.

When Attorney Shanley did not appear at approximately 12:05 p.m., the plaintiff then advised the Court that she had engaged yet another attorney, Boyd S. Lemon, a member of the California Bar since 1966 and the United States Supreme Court, to serve as her expert. A document setting forth the qualifications of Attorney Lemon was admitted by the Court and marked for identification .

The Court decided: "Having had enough – and sensing it had been patient in the extreme ... this Court then confirmed its allowance of the defendant's motion and ordered this case dismissed."

Plaintiff advised that she had a third expert, whose resume indicating retention in more than 300 legal malpractice and attorney's fee disputes was admitted for identification by the Court, was deemed unqualified because he is not a member of the Massachusetts Bar.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. *First,* this case presents the opportunity to decide an important question whether notwithstanding that plaintiff had retained three expert witnesses, the law of Massachusetts does not require an expert witness in every legal malpractice cases; and a legal expert is not required in the present case. *Second,* if the law of Massachusetts requires an expert witness in the present legal malpractice case, the fact is that plaintiff had retained three expert witnesses

A. NOTWITHSTANDING THAT PLAINTIFF HAD RETAINED THREE EXPERT WITNESSES, THE LAW OF MASSACHUSETTS DOES NOT REQUIRE AN EXPERT WITNESS IN EVERY LEGAL MALPRACTICE CASES; AND A LEGAL EXPERT IS NOT REQUIRED IN THE PRESENT CASE.

In Massachusetts, an attorney owes his or her client a duty to exercise the degree of care and skill of the average qualified practitioner. *Fishman v. Brooks*, 396, Mass. 643, 646, 487 N.E2d 1377 (1986); *Pongonis v. Saab*, 396 Mass. 1005, 486 N.E.2d 28, 29 (1985); *Glidden v. Terranova*, 12 Mass. App. Ct. 597, 598, 427 N.E.2d 1169 (1981).

In an action for legal malpractice, expert testimony is **generally** needed to establish both the level of care owed by the attorney under the particular circumstances and the alleged failure to conform to that benchmark. *Pongonis v. Saab,* 486 N.E.2d at 29; *Glidden v. Terranova,* 12 Mass. App. Ct. at 598, 427 N.E.2d 1169.

However, the court of the Commonwealth's courts have recognized an exception to the expert testimony requirement "where the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge or experience to recognize or infer negligence from the facts." *Id. See Pongonis v. Saab,* 486 N.E.2d at 29 (similar). See generally Barry, *Legal Malpractice in Massachusetts*, 63 Mass. L. Rev. 15, 17 (1978).

A finding of legal malpractice without the benefit of expert testimony has been upheld, for example, in *Glidden v. Terranova, supra.* There, the attorney, after being hired with respect to a suit in which his clients were named as defendants, assured them that he had removed the action to the state superior court. The lawyer indicated that everything was well in hand; he had the ball and would run with it. Relying on these comforting words, the clients did nothing further. In fact, the attorney—assurances notwithstanding—had not effected the removal and had permitted default judgments to be entered. Thereafter, the lawyer failed to appear at two hearings—one of which was a scheduled contempt hearing that resulted in the arrest and imprisonment of one of the clients (Glidden). When the remaining clients, dumbfounded by the course of events, sought out the attorney, they were told he was in conference and could not be disturbed. His only response to the clients' desperate pleas for help was a call from his secretary suggesting that they raise the bail and seek other counsel. On the presentation of evidence suggesting facts such as these, the Supreme Judicial Court saw no need for expert testimony in order to establish what was obvious to all—that the lawyer had been woefully negligent. *Id.* at 600.

Plaintiff's case is like that of Glidden, and a jury could so find.

Massachusetts is not alone in dispensing with expert testimony in egregious case, where an attorney not only acts without authority or consent and brings about decisions against the interest of the misrepresented person. Courts in other jurisdictions have also dispensed with any expert testimony requirement in egregious cases. *Suritz v. Kelner*, 155 So.2d 831, 834 (Fla.Dist.Ct.App.1963) (per curiam) (failure to advise client of need to answer interrogatories), *cert.denied*, 165 So.2d 178 (Fla.1964); *Sorenson v. Fio Rito*, 90 Ill. App.3d 368, 45 Ill. Dec. 714, 720, 413 N.E.2d 47, 53 (1980) (failure to take any action whatsoever with regard to estate matters); *House v. Maddox*, 46 Ill.App.3d 68, 4 Ill. Dec. 644, 360 N.E.2d 580, 584 (1977) (allowing statute of limitations period), cert. quashed, 93 N.M. 172, 598 P.2d 215 (1979); *Olfe v. Gordon*, 93 Wis.2d 173, 286 N.W.2d 573, 578 (1980) (failure to abide by client's specific instructions); *cf. Hill v. Okay Construction Co.*, 312 Minn. 324, 252 N.W.2d 107, 116-17 (Minn.1977) (no expert testimony required when conflict of interest "obvious").

When the events of this litigation are displayed against the backdrop of the foregoing cases, it will be clear that defendant Kagan committed malpractice "so gross or obvious" that expert testimony would not be required to prove it. Once Kagan undertook to act on behalf of Kaplan he acted against her interest and without authorization. He completely ignored not only the client's wishes, misrepresented the situation and ignored her protestations.

B. IF THE LAW OF MASSACHUSETTS REQUIRES AN EXPERT WITNESS IN THE PRESENT LEGAL MALPRACTICE CASE, THE FACT IS THAT PLAINTIFF HAD RETAINED THREE EXPERT WITNESSES

The plaintiff first retained Attorney Kevin P. Curry, 50 Congress Street, Boston. After he was paid for his services and agreed to testify, he, wrote to the Court stating that he would not testify.

Even at this stage of the litigation, the Court indicated that "it undoubtedly would have been warranted to ... dismiss the plaintiff's case", but she was given essentially another month, until May 11, 2000, to engage an expert and report back to the Court.

Plaintiff appeared and filed the resume of Attorney Patrick Shanley, who had been referred to plaintiff by the Lawyer Referral Service of the New Hampshire Bar Association, along with Supplemental Answers by Attorney Shanley to Expert interrogatories dated May 9, 2000. Those answers stated that the plaintiff expected to call Attorney Shanley as her expert witness.

On the request of counsel for the defendant, the Court then scheduled a *voir dire* hearing for June 9, 2000, at 10:00 a.m. Before the hearing, the plaintiff sent the Court a letter from the plaintiff stating that Attorney Shanley could not arrive for the 10:00 o'clock hearing until about 11:00 a.m.

Attorney Shanley arrived at the Court house at 10:45 a.m. He was told that the "motion" was to be heard in court room 4, but when he went there, a trial was in progress. When he returned to the motion desk, he was told that the motion would be heard at 2:00 p.m.

When Attorney Shanley did not appear at approximately 12:05 p.m., the plaintiff then advised the Court that she had engaged yet another attorney, Boyd S. Lemon, a member of the California Bar since 1966 and the United States Supreme Court, to serve as her expert. A document setting forth the qualifications of Attorney Lemon was admitted by the Court and marked for identification .

The Court decided: "Having had enough – and sensing it had been patient in the extreme ... this Court then confirmed its allowance of the defendant's motion and ordered this case dismissed."

Summary judgment was improperly granted because it is appropriate only if there is no genuine issue as to any material fact so that the moving party is entitled to judgment as a matter of law. *McHerron v. Jiminy Peak, Inc.*, 422 Mass. 678, 679 (1996). Moreover, the party moving for summary judgment has the burden of "affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue raised by the pleadings *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991). This case is replete with issues of material fact on every relevant issue raised by the pleadings.

THE PRECISE RELIEF SOUGHT

The trial court wrongly granted summary judgment on the ground that the expert witness for legal malpractice retained by plaintiff did not appear for a scheduled voir dire, although the expert was at the courthouse and given incorrect information by the motion clerk.

In the present case no expert is needed because of the gravity of the legal malpractice which will be demonstrated at trial, but in any event plaintiff has three malpractice experts

CONCLUSION

Accordingly, the grant of the Motion for Summary Judgment should be reversed and the case set down for jury trial to resolve the disputed questions of material fact.

Respectfully Submitted,

RACHEL KAPLAN
35 Willow Avenue
Winthrop, MA 02152
(617) 846-6425

December 8, 2004

APPENDIX

Supreme Judicial Court for the Commonwealth of Massachusetts

One Beacon Street, Third Floor, Boston, Massachusetts 02108
(617) 557-1020

Rachel Kaplan
35 Willow Ave
Winthrop, MA 02152

RE: Docket No. FAR-14258

RACHEL KAPLAN
vs.
SPENCER KAGAN

Suffolk Superior Court No. 94CV03534
A.C. No. 2003-P-0231

NOTICE OF DENIAL OF F.A.P. APPLICATION

Please take note that on 09/10/04, the above captioned Application for Further Appellate Review was denied. The motion to file response to opposition was allowed.

Susan Mellen, Clerk

Dated: September 10, 2004

cc: Rachel Kaplan
Scott D.Burke, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
03-P-231

RACHEL KAPLAN

VS-

SPENCER KAGAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Plaintiff, then represented by counsel, evidently brought a complaint (filed on June 30, 1994, A. 1) alleging legal malpractice against the defendant arising out of his misrepresentation of her in divorce proceedings.[1] She evidently declined to seek an expert witness despite advice of counsel and, by order dated July 13, 1999, her counsel were allowed to withdraw, a Superior Court judge affording her time to find new counsel (and presumably, an expert if one were necessary) (A. 4). The plaintiff failed to obtain either new counsel or an expert witness and, on April 11, 2000 (on the eve of trial), the defendant filed an emergency motion for summary judgment. After hearing, a Superior Court judge conditionally allowed the defendant's motion unless the plaintiff appeared on May 11, 2000,"and show that she has engaged an expert witness" (A. 4). After hearing on May 11, 2000, the plaintiff having failed to

[1] Although the complaint has not been reproduced and thus the specific nature of the alleged malpractice is unknown, Plaintiff did identify six instances of alleged negligence in her supplemental answers to interrogatories (S.S. 175), none of which she discusses in her appellate brief.

obtain expert witness 2 the same judge (decision, S.A. 170-173) dismissed the plaintiff's complaint. After the judge denied the plaintiff's pro se motions for reconsideration and for relief from judgment, the plaintiff appealed, but she offers nothing by way of her pro se appellate briefs supporting reversal. The plaintiff has not made any showing that expert evidence was unnecessary to establish the attorney's failure to meet the standard of csare owed in the p[articular circumstances. Compare Harris v. Magri, 39 Mass. App. Ct. 349, 352-353 (1995); Labovitz v. Feinberg, 47 Mass. App. Ct. 306, 309 (1999), with McBarron v. Lenaha.n, 58 Mass. App. Ct. 227, 230 (2003). See also Fishman v. Bro.oks., 396 Mass. 643, 647 (1986); Pongonis v. Saab, 396 Mass.1005 (1985).

Judgment affirmed.

By the Court (Perretta, Kafker & Mills, JJ.),

/s/ Ashely Ahearn
Clerk

Entered: May 7, 2004.

Although the plaintiff claimed t-o have retained an expert, the expert, who had been an attorney for only one year, failed to appear for a scheduled voir dire on his qualifications. Although the plaintiff claims that the expert had appeared in timely fashion but was misdirected by a clerk of court, the judge was not obliged to credit hearsay, and could still fault the plaintiff for failing to communicate with her witness so as to have him appear in proper fashion, particularly in the circumstances. The plaintiff also claimed the judge erred in rejecting her attempt to substitute a California lawyer, who had not been previously identified, for the proposed expert, who did not appear. The plaintiff has not demonstrated any abuse of discretion on either of these decisions.

COMMONWEALTH Of MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 94-3534-E

RACHEL KAPLAN

VS.

SPENCER KAGAN

MEMORANDUM AND FURTHER ORDER ON DEFENDANTS EMERGENCY MOTION FOR SUMMARY JUDGMENT

This matter,- once again, came before this Court on June 9, 2000. -Scheduled then was a voir dire hearing on the qualifications of Patrick Shnaley, Esquire, to act as an expert witness for the plaintiff in this legal malpractice action. For the reasons that follow, the defendant's Emergency Motion for Summary Judgment is allowed and this case is dismissed. This memorandum explains the Court's reasons.

On April 11, 2000, the defendant, just days before the scheduled empanelment of a jury in this case, served and filed his Emergency Motion for Summary Judgment that is now in issue. The basis for the motion was that the plaintiff, who is now proceeding pro se, did not have an expert witness available to testify on her behalf

This case is a legal malpractice action in which the plaintiff charges that the defendant, wlio represented her in a divorce proceeding in the Probate and Family Cour4. breached or failed to exercise the standard of legal care owed to her in handling the matter for which he was retained.

In such a case, the plaintiff must prove, among other things:

(1) that the defendant's representation fall below the standard of legal care -- which includes proof of what that standard was; (2) that as a result of the breach or failure the plaintiff suffered a loss that she would not otherwise have incurred; and (3) that the attorney's breach or failure with regard to the standard of legal care was a cause of die plaintiff's loss.

The law in Massachusetts is quite clear that in order to prove each of the foregoing three elements a plaintiff must present evidence from a duty qualified expert witness. See, e.g., Colucci v. Rosen, Goldbrrg, Slavet, Levenson & Wekstein, P.C., 25 Mass. App. Ct. 107 (1987); Fishman v. Brooks, 396 Mass. 643 (1986).

By an order dated April 13, 2000, this Court conditionally allowed the defendant's motion for summary judgment because the plaintiff did not, at that time, have an expert witness.[1] This Court, however, did not -- as it undoubtedly would have been warranted to do -- then dismiss the plaintiff's case. Rather, she was given essentially another month, until May 11, 2000, to engage an expert and report back to the Court.

By the time scheduled, the plaintiff appeared and filed Supplemental Answers to Expert Interrogatories dated May 9, 2000. Those answers state that the plaintiff expected to call Mr. Shanley as her expert witness in this case.

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1. This should have come as no surprise to the plaintiff. Nearly a year earlier, on July 17, 1999, Judge Nonnie Burnes of this court warned the plaintiff that she was ill-advised to proceed without counsel and that a malpractice case, such as this, would require expert testimony.

The interrogatory answers revealed, in a brief resume, that Mr. Shanley is an attorney who graduated from law school in 1998 and was admitted to practice in Massachusetts in 1999. The malpractice charged occurred between March 9, 1992 -and February 19, 1993, in a divorce proceeding in the Suffolk Probate and Family Court.

On the request of counsel for the defendant, this Court then scheduled a voir dire hearing for June 9, 2000, at 10:00 a.m. The purpose for the hearing was to provide an opportunity for the defendant to inquire of Mr. Shanley, under oath, to determine whether he was qualified to give expert opinion as to the defendant's conduct in this case.

Next, the Court received a letter from the plaintiff stating that Mr. Shanley could not arrive for the 10:00 o'clock hearing until 11:00 a.m.

Mr. Shanley, however, did not appear at 11:00 a.m., nor did he communicate in any way with the Court regarding this failure. The Court, nevertheless, advised the plaintiff, at about 11:30 a.m., that it would await Mr. Shanley's arrival up to 12:00 Noon, but no further.

At approximately 12:05 p.m. the Court came on the bench. Mr. Shanley was still not present and had still not communicated to the Court where he was or if he was coining. Further, on inquiry of the plaintiff, the Court was advised by her that she had no knowledge of where Mr. Shanley was, and that a call to his office would be futile because it would only produce a response by an answering machine.

Seemingly aware that the circumstance that developed was not a surprise to her, the plaintiff then argued to the Court that she had engaged yet another attorney to serve as her expert. Upon further inquiry, the Court was advised that this most recent attorney was not admitted to practice in Massachusetts.

Having had enough -- and sensing that it had been patient in the extreme with the plaintiff's situation[2] -- this Court then confirmed its allowance of the defendant's motion and ordered this case dismissed.

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[2] And further noting that two judges in the Probate and Family Court had already declined to grant further relief to the plaintiff after she, with new counsel, petitioned therefor after her termination of the defendant as her counsel in the divorce proceedings.

ORDER

For the reasons stated, the plaintiff's complaint is ordered to be DISMISSED.

/s/ *Allen van Gestel*
Allan van Gestel
Justice of the Superior Court

DATED. June 12, 2000